IN THE SUPREME COURT

of the United States

October Term, 1976
No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,

Respondents.

On Writ of Certiorari
to The
Supreme Court of Oregon

BRIEF OF RESPONDENTS

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OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011. 1/

1/ A single judgment and opinion was rendered by the Supreme Court of Oregon in the five cases, which had been consolidated for trial and all subsequent proceedings. The Respondents are all of the trustees (plaintiffs below) in each of the five cases. Petitioner was the sole defendant below in each of the cases.

JURISDICTION

The Supreme Court of Oregon in this case rejected a defense claimed by petitioner under §302 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §186). This Court has jurisdiction under 28 U.S.C. §1257(3) to review the judgment of the Supreme Court of Oregon by writ of certiorari.

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. The petition for certiorari was filed December 24, 1975, and granted by this Court on March 1, 1976.

QUESTION PRESENTED

Petitioner, a contractor signatory to a collective bargaining agreement which obligates him to make payments to five separate trust funds, the amount of those payments being based on the hours worked by the employees of his non-signatory

subcontractor, alleges that these payments violate §302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186. The legal issues thus raised are the following:

a) Does §302(c)(5), which authorizes payments to Health & Welfare and Pension Trusts, established for the "exclusive benefit of the employees of such [a contributing] employer" forbid payments to such trusts where the applicable trust agreements provide that only employees of contributing employers are eligible for benefits thereunder?

b) Does §302(c)(6) which authorizes payments to, inter alia, vacation and apprenticeship and training program trusts, if these are established in accordance with §302(c)(5)(B), incorporate also the "exclusive benefit" requirement of §302(c)(5)?

c) Has petitioner established that one half of the trustees of the Construction Industry Advancement Fund are appointed by the union (so that payments thereto are subject to §302), notwithstanding the express terms of the Agreement establishing that Fund that all trustees thereof will be appointed by an employer association?

STATUTORY PROVISIONS INVOLVED

This case involves §302 of the Labor-Management Relations Act of 1947, as amended ("LMRA" or "the Act"), 61 Stat. 157, 73 Stat. 537, 83 Stat. 1133, 87 Stat. 314, 29 U.S.C. §186. It is reproduced at Pet. Br. 23-28. In this Court, petitioner also presents an argument under the Davis-Bacon Act, 40 U.S.C. §276a, which is reproduced as an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

We accept the statement of the case by the Supreme Court of Oregon (Pet. Br. 31): 2/

> "These five consolidated cases are suits in equity by the trustees of funds [respondents Schlecht, et al.], established under a labor-management contract against a general building contractor [petitioner Walsh] who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be 'bound to all of the provisions of this Agreement' or else maintain records for the subcontractor's employees 'and be liable for payment' of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and 'construction industry advancement.'
>
> "The nonunion subcontractor [Jackson] paid an amount equal to these 'fringe benefits' directly to his employees in

2/ "Pet. Br." refers to petitioner's brief herein. "A." will refer to the appendix in this Court.

addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

"The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that 'it is inequitable' to require defendant to make payments which 'amount to double fringe benefits' to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that 'it is equitable' to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as 'funds which do not accrue benefits directly to the workmen.'

"Plaintiffs appeal[ed] from the decree of the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeal[ed] from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases."

The Supreme Court of Oregon unanimously

reversed on the plaintiff Trustees' appeal and affirmed on the defendant Contractor's appeal. The court rejected Walsh's equitable defenses. It also rejected Walsh's contention that the payments were forbidden by §302 of the LMRA. Pet. Br. 34-37. The court did not discuss, because Walsh did not assert, any defense under the Davis-Bacon Act, 40 U.S.C. §276a.

SUMMARY OF ARGUMENT

I.

A. Petitioner challenges the legality of payments to the Health and Welfare and Pension Trusts on the ground that they fail to satisfy the requirement in the opening phrase of §302(c)(5) that payments to such a fund must be "for the sole and exclusive benefit of the employees of such [a contributing] employer * * *". His contention is that petitioner's payments, being based on

the hours worked by the non-signatory subcontractor's employees, are "for the benefit" of those employees. Petitioner's factual premise is unwarranted in the record and erroneous. The Trust Agreements expressly provide that they are "for the benefit of the employees of the individual employers"; the term "employee" is defined as "[a]ny employee whether Union or Non-union of an Individual Employer * * *". Thus, under the express terms of the Trust Agreements an employee does not receive benefits by working for a non-signatory subcontractor, or by having contributions made by petitioner because of the work he performs for the subcontractor. Under the Trust Agreements, they can achieve eligibility if, and only if, they perform (before or after working for the non-signatory) work for a signatory contributing employer; in that event, both the

Agreement and the statute are complied with.

The foregoing circumstances distinguish this case from Moglia v. Geoghegan, 403 F.2d 110 (C.A. 2) and others cited by petitioner. In each of those cases, it was held to be illegal to pay benefits to an individual who had never been an employee of a signatory contributing employer. The situation here is, as the court below recognized, identical to that in a series of cases arising in the ladies' garment industry, which have upheld the legality of payments to health, welfare and pension funds made by contributing employers on the basis of the wages of their non-signatory subcontractors.

It adds nothing to petitioner's case to say that the payments were "on

behalf of" the subcontractor's employees. This phrase, to the extent that it reflects reality, means only that under the collective bargaining agreement the work of the subcontractor's employees is the measure of the signatory contractor's obligation to make payments to the funds. Section 302 does not regulate the basis on which such payments are made. It is no disservice to the purpose (declared by this Court in Arroyo v. United States, 359 U.S. 419, 425) to allow employers to make contributions to a pension or health and welfare fund based upon hours worked by persons who may never benefit from such contributions. Indeed, since Congress consciously determined to permit such funds, it is well to remember that this result is inherent in the very nature of such funds because their benefit structures

are invariably based on the assumption that only a certain portion of the employees with respect to whose hours contributions are made will ever derive a benefit therefrom.

Petitioner's characterization of his obligation as a "penalty" is irrelevant for purposes of §302. Moreover, it is inaccurate. A clause which requires contributions to be made to a fund with respect to work which a signatory employer has contracted out to a non-signatory serves a significant function in maintaining the financial integrity of the fund, and safeguarding its ability to pay benefits to covered employees or accomplish its other purposes.

B. Contrary to petitioner's contention, §302(c)(6) which governs payments to the Vacation and Apprenticeship and Training Trusts does not embody the

"exclusive benefit" language of §302(c)(5). Congress stated in §302(c)(6) precisely how much of §302(c)(5) it wished to incorporate, namely §302(c)(5)(B); it is not for the courts to add an additional requirement which Congress omitted. Moreover, since apprenticeship and training funds are plainly not for the exclusive benefit of employees, petitioner's interpretation would nullify the privilege to establish such funds granted in §302(c)(6).

C. The payments to the Construction Industry Advancement Fund are not governed by §302 at all, because, as the Trust Agreement provides, all the trustees of that fund are appointed by an employer association. Petitioner's contrary suggestion is based on a misreading of the testimony he cites.

II.

Petitioner asserts that the payments

would frustrate the purpose of the Davis-Bacon Act, 40 U.S.C. §276a. That contention is not properly before this Court because it was neither presented nor decided in the Oregon courts, nor raised in the petition for certiorari.

In any event, petitioner's position is without merit. The Davis-Bacon Act was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (United States v. Binghamton Const. Co., 347 U.S. 171, 176-177.)

The Davis-Bacon argument has no great substance as a make-weight addition to petitioner's proffered interpretation of §302 of Taft-Hartley. Section 302, a criminal statute, was adopted to achieve certain narrow, specific purposes. Thus, as this Court recognized in Arroyo v. United States, 359 U.S. 419, it cannot

do service to promote other objectives, which Congress sought to accomplish by other laws, or not at all.

ARGUMENT

I. ALL OF THE CHALLENGED PAYMENTS ARE LAWFUL UNDER §302 OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

Introduction

Petitioner entered into a collective bargaining agreement whereby he agreed to make payments to each of five trust funds, the amount of such payments to be determined on the basis of the number of hours worked both by his own employees and by the employees of his subcontractors. He now seeks to avoid that obligation, contending that all such payments are forbidden by §302 of the Labor-Management Relations Act of 1947, as amended.

Section 302 declares it to be a

crime for any "employer" to make payments to "any representative of any of his employees * * *" (§302(a)(1)) and for "any person" to receive a payment forbidden by §302(a). But §302(c) contains several exceptions to this prohibition, set forth in subsections (1) through (8), allowing payments for certain specified purposes. Petitioner's statement of the Question Presented (Pet. Br. 3-4) and his Argument (id. 10-19) treat the payments at issue here wholesale, as if the legality of all were governed by the same statutory standard that is set forth in §302(c)(5). This is incorrect. Only payments to the Health and Welfare Trust and Pension Trust are governed by §302(c)(5). (See pp. 16 - 49 infra.) Payments to the Vacation Savings Trust and the Apprenticeship and Training Trust are governed by §302 (c)(6). (See pp. 50 - 54 infra.) And

payments to the Construction Industry Advancement Fund are not governed by §302 at all: Because that Trust is administered exclusively by employers, it is not a "representative"; accordingly, payments to it are not within the prohibition of §302(a) and (b) to which the various subsections of (c) are exceptions. (See pp. 55 - 57 infra.)

Clarity of analysis requires that payments which are controlled by different provisions of law be discussed separately. When each of the trusts is thus examined in light of the law applicable to that trust, it will readily be seen that none of the payments that petitioner would avoid is prohibited by §302.

A. The Payments to The Health and Welfare and Pension Trusts are Lawful.

The legality of the payments to the Health and Welfare Trust and to the Pension Trust depends on whether they satisfy the requirements of §302(c)(5).

Petitioner challenges the legality of his making payments to the Health and Welfare and Pension Trusts solely for alleged non-compliance with the requirement that the Trusts must be:

> "established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents."

Petitioner contends that this requirement is not met. We now show that petitioner is in error.

1. The beneficiaries of the trusts are identified in the respective Trust Agreements. Art. II, §2 of the Health and Welfare Plan Fund Trust Agreement (P. Ex. 4, pink paper, p. 5) states:

"This Trust Fund is created for the purpose of providing and maintaining through policies issued by duly licensed insurance carriers or hospital-medical service organizations, group life and group accident and health insurance including group hospitalization, medical and surgical benefits, or any of such insurance as may be determined by the Trustees for the benefit of the employees of the individual employers and associate employees, and if so determined by the Trustees, in whole or in part, group insurance for hospitalization, surgical and medical care for the families of such employees as defined by the Trustees."
(Emphasis added.)

The term "employee" is defined in Art. I, §3a of that Agreement (id. p. 3) as follows:

> "Any employee whether Union or Non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union." 3/
> (Emphasis added.)

3/ The term "associate employee" is defined in Article I, Sec. 3b, to cover also non-bargaining unit employees of contributing

So too, Art. II, §2 of the Pension Trust Fund Agreement (P. Ex. 4, blue paper, p. 5) provides:

> "This Trust Fund is created for the purpose of assisting Employees and their beneficiaries in providing a life income for their support when they shall have retired from the industry, as may be determined by the Board of Trustees pursuant to the provisions of the Pension Plan. The Board of Trustees shall establish in the Plan such eligibility requirements and benefit schedules as it may from time to time deem appropriate."

And "employee" is defined in Art. I, §3 of that Agreement as follows:

> "Any employee whether union or non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union or any supervisor who formerly performed work of the type covered by the

(3/) employers and employees of the Union for whom the Union makes contributions. The former inclusion is within the language of Sec. 302; the latter was approved as complying with Sec. 302(c)(5) in Blassie v. Kroger Co., 345 F.2d 58, 72-74 (C.A. 8, Blackmun, J.).

> Collective Bargaining Agreement and who supervises such employees." (Emphasis added.)

Thus, under both plans, a person becomes a beneficiary only if he is an employee of a contributing employer, just as the statute commands; the plans are structurally in compliance with the Act. It is therefore lawful for an employer who, like petitioner, is a signatory to a written agreement with the Unions requiring payment to the trusts, to make such payments, unless the express terms of the trusts are breached in practice.

Petitioner presents no evidence that any of the non-signatory subcontractor Jackson's employees have actually received benefits in violation of the statute (which would, as we have seen, also violate the Agreement), or that any non-eligible individual has received benefits.

Nor does he show that Jackson's employees became eligible for benefits by virtue of petitioner's contributions. Their eligibility is determined by the Trust Agreements, which restrict benefits to employees of signatory employers, and not as petitioner would have it appear: To employees "on whose behalf" contributions are made, which means only (as we shall discuss) that the hours they work are the measure of petitioner's payment.

As petitioner correctly states (Pet. Br. 12), Jackson, the subcontractor, made no payments to these trusts, which will not receive contributions from him, because he is not a signatory to an agreement requiring contributions. 4/

4/ We note that by refusing to take contributions from a non-signatory, the trusts are in compliance with the requirement of Sec. 302(c)(5)(B) enforced in the two cases on which petitioner especially relies - Moglia v. Geoghegan, 403 F.2d

But for precisely the same reason, those employees' work for Jackson does not qualify them for benefits, for, under the terms of the Agreements, these are limited to employees of contributing employers.

It follows further that if these employees' entire working career were for Jackson, and Jackson never became a signatory, the Agreements themselves would prevent them from ever receiving benefits. And if it were the nature of this industry that an employee has a single employer throughout his career in the industry, we could state without qualification that none of Jackson's employees would ever become eligible for payments. However, for the sake of accuracy and completeness, we note briefly

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(4/) 110 (C.A. 2); and Bricklayers, etc. v. Stuart Plastering Co., 512 F.2d 1017 (C.A. 5).

that such an individual could be eligible if he was also employed by a signatory employer. It is well-known that employment in the building and construction industry is transitory and peripatetic: "An individual employee typically works for many employers and none of them continuously." 5/ Thus, a carpenter who worked for Jackson on the Oak Hill project, out of which this case arose (Pet. Br. 4), may have worked for an employer who was signatory to the Trust Agreements prior to working for Jackson, or may have worked for a signatory after the Oak Hill project was completed. As any individual who performed work for a signatory contractor during the time he made contributions under the Agreements would be eligible for benefits,

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5/ S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 27.

6/ one of Jackson's employees on the Oak Hill project would be eligible for benefits if (and only if) he qualified by working for a contributing signatory. In that event, it would be entirely lawful under §302(c)(5) to provide him with benefits because he would then be an "employee" of a contributing employer. The law does not require that an "employee" be disqualified because he had also worked for a non-signatory contractor. That is the precise holding of Roark v. Boyle, 439 F.2d 497 (C.A.D.C.) and Crawford v. Cianciulli, 357 F.Supp. 357, 369-370 (E.D. Pa.), cited at Pet. Br. 14.

2. The fact that under the Trust Agreements Jackson's employees do not

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6/ We refer here only to eligibility in terms of the Agreements' definition of "employee"; of course, the qualifications for receipt of benefits which are set by the Trustees must also be met.

become eligible unless they at some time perform work for a contributing signatory employer distinguishes the present case from each of the cases on which petitioner places his claim of illegality. In Moglia v. Geoghegan, 403 F.2d 110 (C.A. 2) cert. denied, 394 U.S. 919, Moglia had a single employer for 28 years (id. at 114) whose payments to the trust were illegal because he was not a party to a written agreement as also required by §302(c)(5)(B).

> "Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund. Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust.

> Rittenberry v. Lewis, 238 F.Supp 506 (E.D. Tenn. 1965); Bolgar v. Lewis, 238 F.Supp. 595 (W.D. Pa. 1960)."
> Id. at 116, emphasis added to show the language particularly relied on by petitioner (Pet. Br. 13).

Moglia was never an employee of an employer who was lawfully contributing; it was therefore unlawful for him to be a beneficiary.

The Rittenberry and Bolgar cases followed by the Moglia court, and also relied on by petitioner, were suits by miners for benefits under the United Mine Workers of America Welfare and Retirement Fund which was established by National Bituminous Coal Wage Agreements. In both cases, the plaintiff was held to be disqualified under §302 because he had not been employed by a signatory, contributing employer. In Rittenberry, the court said:

> "In view of the fact that it is undisputed that the plaintiff

> was never employed by an employer who was a signatory to the National Bituminous Coal Wage Agreement, it is the opinion of the Court that he could not, as a matter of law, qualify as a beneficiary under the trust."
> 238 F.Supp. 506, 508.
> (Emphasis added.)

So too, in In re Typo-Publishers Outside Tape Fund, 344 F.Supp. 194, affirmed 478 F.2d 374 (C.A. 2), cert. denied 414 U.S. 1002 (Pet. Br. 14), the arbitration award was held to be unlawful because, as then Judge Tyler put it in the District Court:

> "Inasmuch as the award in this case seeks, in a similar situation, to use the trust funds to benefit employees who are not and never have been employees of contributing employers, implementation of the award would violate §302(a)."
> 344 F.Supp. at 196-197.

Thus, each of the cases in which a payment was held to be unlawful the employee who sought the benefits had never performed work for a signatory contributing employer. Any of Jackson's employees

who had never performed work for a signatory contributing employer to the Trusts herein would likewise be ineligible. Conversely, those of Jackson's employees who worked for a signatory contractor would be eligible notwithstanding that they had also worked for Jackson, just as in Crawford v. Cianciulli, 357 F.Supp. 357 (E.D. Pa.) (Pet. Br. 14). 7/

In sum, the making of the payments, which petitioner challenges is in full compliance with the law as stated by Mr. Justice Blackmun for the Eighth Circuit in Blassie v. Kroger Co., 345 F.2d 58, 71, quoted in part at Pet. Br. 14:

> "* * * the statute does not, and the trust agreement therefore cannot, permit the extension of benefits to persons who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions."

7/ Petitioner quotes at length from Bricklayers v. Stuart Plastering Co., 512 F.2d 1017, 1024-1025 (C.A. 5) (Pet. Br. 16-17). We agree with everything that is there said, but it does not advance petitioner's case one iota. There the trust agreement had never been executed, and thus no trust was established.

The Trust Agreements herein do not allow benefits to be received by individuals in either of the forbidden categories; and there is no evidence that any such individuals in fact received or were intended to receive such illegal benefits. Accordingly, the payments here are entirely lawful.

3. The lower court cases which do decide the legality of payments identical to those in this case are those relied on by the Supreme Court of Oregon (Pet. Br. 36-37): Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182 (S.D.N.Y.) and Budget Dress Corp. v. Joint Board, 198 F.Supp. 4 (S.D.N.Y.), aff'd. 299 F.2d 936 (C.A. 2), cert. denied 371 U.S. 815. As petitioner correctly describes those cases,

which arose in the ladies' garment industry, they involved "an agreement requiring an employer to make contributions to trust funds in accordance with a formula based upon hours of his own employees, as well as hours of non-signatory subcontractors' employees" (Pet. Br. 18). 8/

8/ The Agreements in question were fully described by Judge Weinfeld in Greenstein v. National Skirt & Sportswear Ass'n., Inc., 178 F.Supp. 681, 684-685 (S.D.N.Y.):

"The agreement provides for employer contributions to three separate funds, Health and Welfare, Retirement, and Severance. The payments are based upon a percentage of weekly wages of the workers employed by a manufacturer in his inside shop, if he maintains one, and in addition, a percentage of the gross amount paid by him to each of his contractors and sub-manufacturers for labor, overhead and services. The agreement contemplates that work on garments, whether by employees of Association members or outside contractors, will be performed in union shops. However, it appears that plaintiffs, contrary to the agreement, placed work with non-union contractors and that the welfare fund payments made by them included sums computed on amounts paid

The court held that these agreements did not violate §302. As Judge Dimock wrote in Kreindler:

(8/) to non-union contractors for labor, overhead and services.

* * *

"Perhaps in anticipation that some Association members might honor the agreement more in the breach than in observance, the parties agreed that if any payments to the welfare funds are computed upon garments manufactured for an Association member by non-union contractors in violation of the agreement, such portion

'shall be deemed paid to Local #23 solely as liquidated damages for such violation and shall not be deemed payments made for and on behalf of the Health and Welfare Fund * * * All damages paid hereunder to Local #23 shall be turned over by it to a Fund to be established by the International and to be administered by a Board of Trustees, composed of representatives of the International and employers in the women's garment industry and presided over by an impartial umpire, the Fund to have such beneficent purposes as the Board of Trustees shall determine and which shall be in the interests of the workers

"Clarise contends that payment to these Funds of amounts based on the payrolls of employees who cannot share in the benefits from the Funds is illegal.

* * *

"... There is no basis ... for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by statute 'for the sole and exclusive benefit of the employees of such employer ... (or of such employees ... jointly with the employees of other employees [sic] making similar payments ...)'

* * *

"The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal." 184 F.Supp. at 183-184,

(8/) covered by this and similar collective agreements entered into by the International or its affiliates with employer associations.'"

(emphasis in original).

In Budget Dress, Chief Judge Ryan wrote:

"We conclude, as have our colleagues before us, that the statute is in no way concerned with the technical aspects of determining and administering benefits under legitimate plans as defined and made up in accordance with statutory directive (302 (c) (5) (B)), whose sole purpose is to provide benefits for employees of the dress industry covered by the collective bargaining agreements; and that the rules and regulations in question prescribing eligibility under the plans are consonant with this purpose. So long as the funds are used for the benefit of the employees and not diverted to other uses, the statutory immunity applies to these payments - regardless of whether in a proper case a remedy might lie open to an individual employee against the Trustees of the Fund." 198 F.Supp. at 12 9/

9/ In affirming this decision, the Court of Appeals (Moore, Friendly, and Marshall sitting) relied on Minkoff v. Scranton Frocks, Inc., D.C., 181 F.Supp. 542, aff'd per curiam 279 F.2d 115 (2 Cir. 1960) and the District Court's opinion on the Sec. 302 issue, 299 F.2d 936, 937.

The decisions of his "colleagues" which Chief Judge Ryan found persuasive in Budget Dress were those in Kreindler, 184 F.Supp. 4, and Minkoff v. Scranton Frocks, 181 F.Supp. 542 (S.D.N.Y.), aff'd 279 F.2d 115 (C.A. 2), and Greenstein, from which we quoted in extenso at pp. 30-32, n. 8, supra. In Greenstein, Judge Weinfeld also set forth the parties' respective positions, which are indistinguishable from those of the parties here.

There, as here, the gist of the employer's objection was:

> "that insofar as the payments to the funds were based on amounts paid to non-union contractors they were "not paid for the benefit of the employees of the plaintiff or the employees of its contractors, nor were said funds received by the defendants for the benefit of any employees of the plaintiffs' contractors'; that the defendants received the said sums although the employees on whose behalf such

> payments were made are entitled to no benefit from the funds." 178 F.Supp. at 684, emphasis added.

So too, the Union's position was, as ours is:

> "The Union responds that the Act does not specify how monies paid by an employer into a welfare fund are to be computed; that this is a matter to be decided between the employer and the union representatives; that in the instant case they agreed that the payments were to be measured by a percentage of the inside manufacturer's payroll combined with a percentage of payments made by him to his contractor for labor, overhead and services. It urges that this method of computation was adopted to measure the Association members' liability for payment into the fund; that the method has no relationship to which employees are eligible for fund benefits; that eligibility is determined by other provisions of the collective bargaining agreement and the by-laws and rules and regulations which govern the administration of the welfare funds. The Union emphasizes that under the agreement no employee has any right or claim to any payment made by an employer to the funds; that funds are pooled and the right of an employee to receive

> benefits therein follows from his employment by a covered employer - that is - an employer, whether manufacturer, jobber or contractor, who has entered into contractual relations with the Union. In sum, it urges that the method of computation for determining an Association member's liability to the fund is entirely legal and does not contravene section 302." (Id. 686)

Judge Weinfeld commented "[t]hat its [the unions'] position is one of substance and cannot be gainsaid"(id.). He was not called upon to decide more because the case was before him on a motion for preliminary injunction by a signatory employer who wished to avoid making payments.

Petitioner observes that Kreindler and Budget Dress antedated Moglia and Typo-Publishers. But in neither of the later cases did the Second Circuit disapprove Kreindler or Budget Dress. 10/

10/ Thus, the court below was entirely justified in relying on the reasoning of those decisions

Petitioner says:

> "The decisions in Kreindler and Budget Dress are distinguishable. The agreements there included payrolls of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractors' employees. Neither did it appear that the subcontractors' employees were beneficiaries of the funds in those two cases." (Pet. Br. 18)

But we have already shown that the payments are not "for the benefit of" Jackson's employees. And we now show that they are not "on behalf of" those employees in any sense that is prohibited by the statute; indeed, the same locution was unsuccessfully advanced by the

(10/) (Pet. Br. 37). Petitioner asserts that the court below "appears to recognize that its decision in this case conflicts with the interpretation of Sec. 302(c)(5) in Moglia * * *" (pet. Br. 17). We do not so read the language which petitioner quotes. In any event, as stated in the text, we accept Moglia's interpretation, but the facts which were decisive in that case are not present in this case.

employer in the Greenstein case, see pp. 30-32, n. 8, supra, quoting 178 F.Supp. at 684.

Petitioner does not explain what he means by this phrase, which is central to his argument. 11/ It is, in any event, clear that the most that "on behalf of" can accurately mean is that the amount of the payments by petitioner to the fund is based upon the hours worked by Jackson's employees. Petitioner's obligation under the labor agreement is to "maintain daily records of the sub-contractors employes job site hours, and [to] be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions

11/ The same phrase is used in the Question Presented (Pet. Br. 3-4) and Pet. Br. 14. See also Pet. Br. 12, where it is said that the payments are "for Jackson's non-union employees."

in accordance with this Agreement . . ." (A. 82-83, quoted at Pet. Br. 5-6, our emphasis). Thus, "on behalf of such employees" is but petitioner's rephrasing of "these employees' * * * contributions." This in turn is but a shorthand (though perhaps an inartful one) 12/ for the thought that the contributions are made on the basis of the work performed by the employees. It is equally obvious, and in terms of the statutory issue in this case absolutely decisive, that the phrase "employees' * * * contributions" in the collective bargaining agreement does not mean (and that petitioner's alternative phrasing cannot accurately mean) that the payments are for the benefit of those employees. For

12/ Taken literally, the Agreement would mean that the employees make the contributions, but this is, of course, not the case where the signatory performs the work through his own employees or where he uses a subcontractor.

the same phrase is used with respect to all the funds, and a payment to an apprenticeship training fund or an industry promotion fund cannot by any stretch be for the benefit of the employee who performs the work which results in the obligation to make the contribution.

In sum, contrary to petitioner's assertion, the subcontractors clause here does "merely measure the signatory employer's contributions on the basis of a subcontractor's payroll" (Pet. Br. 19); it does not require "contributions for the benefit of the subcontractor's employees" (id.).

4. As petitioner implicitly concedes there is nothing in §302 which regulates the measure of payment to a fund authorized by subsection (c)(5). The purposes of enacting §302 are well known. They were identified by this Court in Arroyo v. United States, 359 U.S. 419:

> "Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See United States v. Ryan, 350 US 299." (Id. at 425-426, footnotes omitted.) 13/

It is no disservice to these purposes to allow employers to make contributions to a pension or health and welfare fund based upon hours worked by persons who may never

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13/ That union, as noted in United States v. Ryan, was the United Mine Workers, which had demanded "that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined" (350 U.S. at 304-305). Congress did not, in enacting Sec. 302(c)(5), forbid such a royalty as the measure of payment.

benefit from such contributions. Indeed, since Congress consciously determined to permit such funds, it is well to remember that this result is inherent in the very nature of such funds because their benefit structures are invariable based on the assumption that only a certain portion of the employees with respect to whose hours contributions are made will ever derive a benefit therefrom.

For example, when a pension plan requires that a participant have a minimum number of hours of covered employment in order to obtain a year of credited service and, further prescribes a specified number of years of such credited service as a condition of eligibility for retirement benefits, it is assumed that a substantial percentage of employees will leave covered employment without ever meeting those requirements, and accordingly, that no benefit will ever be

paid on their behalf despite the fact that their employment may have generated substantial amounts of contributions. This "turnover" of employees who will never qualify for benefits is regarded as "a cost-reducing factor to the pension fund", which makes it possible for a "given contribution rate [to] support a higher level of projected benefits" to those who do achieve the requisite hours and years of service. It is similarly assumed that a given number of participants will die before becoming eligible for retirement benefits and this is also regarded as a factor which "reduces the cost of a pension plan." 14/

14/ See Melone, Collectively Bargained Multi-Employer Pension Plans, (Homewood, Ill., Richard D. Irwin, Inc., 1963) pp. 78-81. See also Bernstein, The Future of Private Pensions, (New York, N.Y., The Free Press of Glencoe, 1964), pp. 39-46; Allen, Melone & Rosenbloom, Pension Planning (Homewood, Ill., Richard D. Irwin, Inc., 1976), pp. 72-76 .

It is likewise clear that contributions to a health and welfare plan providing medical and related benefits will be made on the basis of hours worked by many employees who will not benefit therefrom. Many such employees will be excluded from benefits because of failure to work the minimum number of hours of covered employment in a given quarter (or other eligibility period). Others, quite obviously, will never need the services which such funds provide, and the contri-

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(14/) In studies leading to enactment of the Employee Retirement Income Security Act of 1974 it was found by Congress that only one out of three employees participating in employer-financed pension plans had a substantially vested right to a retirement benefit. (See H.Rept.No. 93-807, p. 12). Even though the legislation was designed to enhance the likelihood that participating employees would realize some portion of their anticipated retirement benefit, it still permits a plan to deny any benefit to any employee who, e.g., has less than 10 years of covered service -- notwithstanding that contributions may have been made with respect to each hour worked by such an employee. (Employee Retirement Income Security Act of 1974, Sec. 203(a)(2); 1012(a); 88 Stat. 854, 902; 26 U.S.C. 411(a)(2); 29 U.S.C. 1053(a)(2)).

butions made with respect to their hours will accordingly be used for the benefit of those who do.

The inherent absence of direct relationship between the contribution made with respect to an employee's hours and the amount of any benefits paid to such an employee is also reflected in the widespread practice, when multi-employer pension plans are established of granting credit to employees for all past service in the industry. See Melone, op. cit. supra, p. 31, where it is pointed out that "[m]uch of this past service in the industry may have been rendered for non-participating and defunct employers", and, accordingly, that "[t]hese costs must be borne solely by participating employers." While such costs may be met by contributions calculated on the basis of the hours worked by currently employed persons, it is clear that the benefits

attributable to past service credits will have no connection whatever with the hours upon which such contributions are imposed.

In short, it is the very nature of these Pension and Health and Welfare Plans that the actual receipt of benefits by any participant, and the amount of benefits which he may receive, are based upon factors which are in large part unknown at the time that the work is performed and which in any case are wholly unrelated to the particular contribution formula which the underlying collective bargaining agreement may impose.

5. And so, petitioner's case comes down to his objection that these payments are a "penalty" (Pet. Br. 10, 11). The legal answer is that §302 was not adopted to relieve employers of improvident or even onerous -- as opposed to corrupt -- conditions to which they have agreed. Cf.

Porter Co. v. N.L.R.B., 397 U.S. 99, 109. Moreover, the epithet is undeserved. A clause which requires contributions to be made to a fund with respect to work which a signatory employer has contracted out to a non-signatory serves a significant function in maintaining the financial integrity of the fund, and safeguarding its ability to pay benefits to covered employees or accomplish its other purposes.

It is typical in these situations for the parties to start with a contribution rate that is negotiated through the collective bargaining process -- a rate based upon such factors as a percentage of payroll or so much per unit of output. Projections are then made as to the actual level of contributions that such rate will produce, and on the basis of those projections the trustees of the

fund develop a benefit structure which, in the light of appropriate actuarial calculations, the fund's income from contributions can be expected to support. As one authority has concluded in describing this process, "the assumption as to future contribution levels is one of the most important factors affecting the financial soundness of these plans." Melone, Collectively Bargained Multi-Employer Plans, Homewood, Ill., Richard D. Irwin, Inc., 1963, pp. 84-85, 91.

It is evident that if the actual contributions fail to meet projections because work which signatory employers were expected to perform has instead been contracted out to non-signatories, the fund may well find itself unable to meet the expectations created by its structure. A contracting-out clause, such as that found in the instant case, plainly

decreases that risk. It advantages not only the employees but the employers in the industry by attracting and retaining skilled help within the local labor force of the industry. 15/

15/ The importance of accurate forecasting of contribution levels has been given new emphasis by the enactment of the Employee Retirement Income Security Act of 1974 (88 Stat. 829, 29 U.S.C. 1001, et seq). That legislation requires that annual contributions to a pension fund, such as that involved in the instant case, must be sufficient to meet the costs of currently accruing liabilities, and to amortize unfunded past service liabilities over a period of not more than 40 years. In adopting this requirement, Congress recognized that even where the contributions to a collectively bargained multi-employer plan are projected at a level sufficient to meet the statutory standards, there may nonetheless be a shortfall due to an unanticipated drop in the amount of employment or productive activity covered by the fund. (See Sen. Rept. No. 93-1090, p. 285). While such a shortfall would not ordinarily subject the participating employers to the otherwise applicable excise tax penalties for failure to meet the Act's minimum funding requirements, the amounts of deficiency involved would have to be treated as an "experience loss", requiring the parties, at the next round of bargaining, to agree upon increased contributions sufficient to amortize such deficiencies over not more than 20 years (see Sen. Rept. 93-1090, p. 285); Employee Retirement Income Security Act of 1974, §§ 302(b)(2)(B)(iv); 1013(a); 88 Stat. 870, 914;

B. The Payments to the Vacation and Apprenticeship and Training Trusts Are Lawful.

The legality of the payments to the Vacation and Apprenticeship and Training Trusts is governed by §302(c)(6) which authorizes payments:

> "with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds ..."

Petitioner asserts that the requirement of §302(c)(5) that payments must be for the exclusive benefit of employees of the

(15/) 26 U.S.C. 412(6)(2)(B)(iv); 29 U.S.C. 1082 (b)(2)(B)(iv). The risk of such "experience losses", and the consequent need to renegotiate contribution rates in order to amortize them, is obviously diminished if those losses are avoided through a clause which protects the fund against diminished income resulting from the contracting out of work otherwise covered by the agreement.

contributing employer, and their families, etc., is applicable also to §302(c)(6) (Pet. Br. 12, .5). In support of this proposition petitioner cites, without further discussion, "Blassie v. Kroger Co., 345 F.2d 58, 74," and Judge Tyler's opinion in In re Typo-Publishers Outside Tape Fund, p. 27, supra, which cites Blassie. We submit that both petitioner and Judge Tyler have misread Blassie, which does not so hold, and that the construction of §302(c)(6) asserted by petitioner is demonstrably wrong.

The discussion of §302(c)(6) in Blassie reads as follows:

> "We reach a like conclusion as to the language of §302(c)(6). This, adopted in 1959, carefully spells out, as an amendment to such a statute should, a then desired broadening of the stated exceptions. This was to remove doubts therefore existing as to apprenticeship and training programs and as to vacation, holiday, severence or similar benefits. H.Rep.No. 741, 2 U.S.

> Code Cong. & Ad.News, 86th Cong., 1st Sess., 1959, pp. 2424, 2445-2456 and 2469-2470."

This statement, which we fully accept, describes the nature of the programs which were to be permitted under §302(c)(6); it says nothing about importing into that subsection the "exclusive benefit" language of §302(c)(5). 16/ Judge Tyler in Typo-Publishers relied exclusively on what he mistakenly believed to have been decided in Blassie. 17/

16/ The issue of which this part of the opinion was addressed was whether Sec.302(c)(6) permits the expenditure of a substantial amount of trust funds for pure recreation. (id. at 74-75).

17/ "The Sec.302(c)(6) exception does not recite the phrase quoted above or, indeed, any of the limitations found in Sec. 302(c)(5). Section 302(c)(6), however, was intended only to expand the scope of valid trust purposes and the limitations contained in Sec.302 (c)(5) are deemed incorporated into Sec. 302(c)(6). Blassie v. Kroger Co., 345 F.2d 58, 74 (8th Cir., 1965)." (344 F.Supp. at 196, n. 2.)

There are two reasons why the exclusive benefit language of §302(c)(5) cannot properly be read into §302(c)(6). First, Congress stated in §(c)(6) quite explicitly how much of §(c)(5) it wanted to incorporate; namely, §(c)(5)(B). 18/ Congress having gone that far but no further, it is not for the courts to read into §(c)(6) the additional limitation stated in §(c)(5). Second, the petitioner's proffered interpretation would make it impossible to have a lawful apprenticeship or training fund since it is not their purpose to benefit the contributing employer's employees. 19/

18/ This provision requires a written agreement, see Moglia, supra, and prescribes the structure of the Fund, most importantly that there must be equal representation of unions and employers.

19/ Article II, Sec. 2 (p. 4) of the Apprenticeship and Training Fund Agreement provides:

> "That the Trust Fund shall be used for the purpose of defraying costs of apprenticeship or other training programs

In that regard, it differs from the purposes permitted by §(c)(5), (7) and (8) all of which describe the purposes of the permitted funds in terms of kinds of benefits to employees.

In sum, petitioner's objection to making payments to the Vacation and Apprenticeship Funds is based on a misinterpretation of §302(c)(6), and must be rejected.

(19/) by the education of apprentices and journeymen, by the establishment, maintenance and/or support of any apprenticeship training school by the furnishing and supplying of facilities, tools, equipment and text books and other materials and supplies for the training of apprentices and journeymen, and by such other matters reasonably related to journeymen, and by such other matters reasonably related to journeymen [typographical error] and apprentice training as the Board of Trustees deems practicable."

This is in contrast to the statements of purpose in the Health and Welfare and Pension Trust Agreements, which as we have seen are to provide benefits for employees. Significantly, petitioner does not assert that the Apprenticeship and Training Fund is structurally deficient under Sec. 302(c)(6); yet his interpretation of the section would compel that conclusion.

C. The Payments to the Construction Industry Advancement Fund Are Lawful.

With respect to the last of the funds, the Construction Industry Advancement Fund (CIAF) trust, petitioner's brief states:

> "Requiring contributions to the CIAF Trust (Case No. 389-038) would not violate §302 if it is administered solely by employer representatives and does not, therefore, involve employer payments 'to any representative' of employees. See NLRB v. Brotherhood of Painters, etc., 334 F.2d 729, 731 (C.A. 7, 1964). Although the CIAF trust agreement (Pl. Ex. 4) authorizes selection of trustees solely by an employer association as trustor, there was testimony that all of the trusts in litigation have an equal number of management and labor trustees. (A. 62)."
> (Pet. Br. 14, n. 6)

Petitioner then asserts that if §302 is applicable, the payments are illegal as not being within one of the exceptions set forth in §302(c)(5)-(8) (id. at pp. 14-15, n. 6). The latter legal proposition is unassailable, but the suggestion that §302

is applicable is wholly baseless.

Petitioner admits that the trust agreement provides for exclusive employer administration. 20/ But petitioner raises a doubt as to whether the trust agreement is followed by misreading the testimony which he cites ("A. 62"), and which we now quote:

> "Q And the trustees of these funds are an equal number of management trustees as labor trustees.
>
> A. Under the Taft-Hartley, the labor management act.
>
> Q. What was your answer?
>
> A. The answer is yes.

20/ This concession is required. Article III, Sec. 1 (p. 3)of the Trust Agreement establishing the CIAF provides:

> "The Fund shall be administered by a Board of Trustees which shall consist of six Trustees designated by Trustor. The initial Trustees shall be those who are parties to this Trust Agreement."

Article I, Sec. 6 in turn defines the "Trustor" as being the Oregon-Columbia Chapter, The Association General Contractors of America, Inc.

> Q. On any of these funds, Health and Welfare, Pension, Vacation, is a beneficiary required to be a union member?
>
> A. No." (A. 62, emphasis added.)

We see that whereas the question of counsel and the witness' answer were confined to "these funds", which the colloquy shows refers to three specific funds (namely, those which pay benefits to employees), petitioner's brief describes the testimony as being "that all of the trusts in litigation have an equal number of management and labor trustees." In short, the factual issue on which petitioner has erected his §302 defense to avoid payment to the CIAF Trust is a sham.

II. NO DAVIS-BACON ISSUE IS PROPERLY BEFORE THE COURT; IN ANY EVENT, THERE IS NO VIOLATION OF THE DAVIS-BACON ACT.

Point B of petitioner's argument is that the Subcontractors Clause "frustrates

the purpose of the Davis-Bacon Act, 40 U.S.C. §276a" (Pet. Br. 19). We submit that this Davis-Bacon issue is a) not properly before this Court and b) utterly without merit in any event.

A. Petitioner did not present the Davis-Bacon issue to the Oregon Supreme Court; nor did that Court decide it. 21/ This jurisdictional defect pretermits the

21/ The only reference to the Davis-Bacon Act in Walsh's argument in the court below was in connection with his contention that the trial court had properly exercised its equitable discretion in denying plaintiff's relief with respect to three of the trust funds; this equitable defense was rejected by the court below, see Pet. 32-33. As this Court explained in Fuller v. Oregon, 417 U.S. 40, 50:

> "Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. '[T]his Court has stated that when ... the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' Street v. New York, 394 U.S. 576, 582."

consideration of this issue. See, e.g., Fuller v. Oregon, 417 U.S. at 50, n. 11; Monks v. New Jersey, 398 U.S. 71; Herndon v. Georgia, 295 U.S. 441. 22/

There is a further deficiency in petitioner's presentation of the Davis-Bacon issue: It is not part of the Question Presented either as stated in the petition for certiorari (p. 3), or in his brief herein (Pet. Br. 3-4). And while the Davis-Bacon Act was discussed in the body of the petition (at pp. 20-23), the thrust of that discussion appears to have been that certiorari should be granted to review the Oregon Supreme Court's interpretation of §302 because

22/ Cf. This Court's Rule 23(1)(f) requiring the petitioner to specify in the Petition for Certiorari where and how the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the Court. None of these directions was followed with respect to the Davis-Bacon issue.

under that interpretation it is more expensive for a contractor governed by Davis-Bacon to use non-union subcontractors; petitioner did not even state in the "reasons for Granting the Writ" an independent claim under the Davis-Bacon Act. It therefore appears that the Davis-Bacon issue is not a "subsidiary question fairly comprised" within the Taft-Hartley issue stated in the Question Presented even on a most generous interpretation of this Court's Rules 23 (1)(c) and 40(d)(1), and for that additional reason should not be considered, see, e.g., Radzanower v. Touche, Ross & Co., 44 U.S.L.Wk. 4762, n. 3 (June 7, 1976); F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 121, n. 6; J. I. Case v. Borack, 377 U.S. 426, 429; Carpenters Union v. Labor Board, 357 U.S. 93, 96.

B. As stated, we do not believe that petitioner's Davis-Bacon issue is properly presented. Nevertheless, we shall respond briefly to it on the merits because there is at least a colorable claim that the prior references to that Act in the petition and in petitioner's brief below are sufficient to permit consideration of his argument. 23/

23/ The same cannot be said for the issue tendered by the brief of the amicus curiae Mechanical Contractor Associations of Washington. For, the amicus acknowledges that the issue which it would like to have decided is not really here: "If this precise issue was (sic) before the court for consideration, we would frame the issue as follows:" (Amicus Br. 3). Yet amicus does not acknowledge, much less address itself to, the jurisdictional and procedural obstacles it must overcome. And it fails to disclose that that "precise issue" is presently being litigated in a case in which the amicus is the plaintiff, Mechanical Contractor Associations of Washington v. Huico, Inc. (W.D.Wash., #C75-667S). Its brief here is in substantial part a reproduction of its argument in support of its motion for summary judgment in that case. Thus, emulating the cowbird which lays its eggs in the nests of other birds, the amicus, eager to circumvent the normal process of adjudication by the

Petitioner's contention that the Subcontractors Clause "frustrates" the purpose of the Davis-Bacon Act by increasing his labor costs over the minimum required under the Act plainly misconceives the purpose of that statute. This Court has held the Act's language and legislative history "plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (United States v. Binghamton Const. Co., 347 U.S. 171, 176-177.) That purpose is obviously not "frustrated" when contractual arrangements of the parties results in

(23/) District Court, the Court of Appeals and on Petition for Certiorari, would have this Court decide that case as an adjunct of deciding this case. The respondent employer and union trustees do not feel called upon or qualified to represent here the interests of the defendant in another law suit. And they are confident that this Court will view with disfavor amicus' effort to confer upon it a fringe benefit for which the Court did not bargain when it granted certiorari herein.

higher payments than the floor established under the Act.

It is settled, moreover, that "[t]he Act * * * confers no litigable rights on a bidder for a Government construction contract," and that the correctness of the Secretary of Labor's determinations "is not subject to attack on judicial review" (id.). See also Bughman Construction Company v. United States, 164 F.Supp. 239, 240 (Ct.Cl.).

The Davis-Bacon argument has no substance as a make-weight addition to petitioner's proffered interpretation of §302 of Taft-Hartley. Section 302, a criminal statute, was adopted to achieve narrow, specific purposes which we have previously described. Thus, as this Court recognized in Arroyo v. United States, 359 U.S. 419, it cannot do service to promote other objectives, which

Congress sought to accomplish by other laws, or not at all.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted,

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APPENDIX

40 U.S.C. §276a

Rate of Wages for Laborers and mechanics - Definitiones. - (a) The advertised specifications for ever [every] contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and ithout subsequent deduction or rebate on any account, the full amounts accrued at time of payment,

computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in this Act [§§276a-276a-5 of this title] the term "wages," "scale of wages," "wage rates," "minimum wages," and "prevailing wages" shall include -

(1) the basic hourly rate of pay; and

(2) the amount of -

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing

benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as this Act [§§ 276a - 276a-5 of this title] and other Acts incorporating this Act [§§ 276a - 276a-5 of this title] by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under this Act [§§ 276a - 276a-5 of this title], such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the type described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater. (Mar. 3, 1931, c. 411 §1, 46 Stat. 1494; Aug. 30, 1935, c. 825, 49 Stat. 1011; June 15, 1940, c. 373, §1, 54 Stat. 399; July 12, 1960, P.L. 86-624, §26, 74 Stat. 418; July 2, 1964, P.L. 88-349, § 1, 78 Stat. 238.)